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IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 83-6390

TERRELL M. JOHNSON

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I.

When appellate counsel is not the same as trial counsel by operation of state law, must specific trial transcript inaccuracies be proven to demonstrate inadequate appellate review, or is it sufficient to prove that the transcript is unreliable and contains substantial omissions?

II.

May jurors be excused for cause under Witherspoon v. Illinois, 991 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1170 (1968) when indicating equivocal feelings about the death penalty by alternating statements of open mindedness and uncertainty with such statements as "I don't think I could recommend the death penalty" and "I probably would automatically recommend life?"

III.

In the circumstances of this death penalty case, is it a violation of due process to allow the state to introduce as evidence on the most crucial trial questions a test showing gun powder markings on paper without proving that markings on paper are substantially similar to those which would be made on skin?

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OPINION BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed by this petition is reported as Johnson v. State, 442 So.2d 193 (Fla. 1983). (See Appendix Item #1, pp. 1-6)

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued its opinion in this case on November 23, 1983. (Appendix #1, pp. 1-6) A Motion for Rehearing was denied by the Florida Supreme Court on January 13, 1984. (Appendix #2, p. 7)

Petitioner asserted below and asserts here violations of the United States Constitution. Title 28 United States Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules confers certiorari jurisdiction on this Court.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

1. Amendment V to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life, or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

3. Amendment VIII to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

4. Amendment XIV, Section 1 to the Constitution of the United States, in part:

> All persons born or naturalized in the Unites States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the equal protection of the laws.

5. Section 921.141, Florida Statutes (1981) which is set forth in the Appendix as item three. (Appendix #3, pp. 8-9)

6. Section 27.51(4), Florida Statutes (1979) which is set forth in the Appendix as item four. (Appendix #4, pp. 10-11)

STATEMENT OF THE CASE

On December 4, 1979, Terrell Johnson, Petitioner, went to Lola's Tavern in Orange County to redeem a pistol he had pawned to James Dodson, the bartender/owner of the tavern. Although Dodson had given Johnson fifty dollars when the gun was pawned, he demanded one hundred dollars to return it. Before paying for the gun, Johnson asked to be allowed to test fire it and took the gun to an open field across the road from the bar where he fired several shots. While returning to the bar, Johnson, irate at what he considered to be Dodson's unreasonable demand, decided to rob the tavern. Johnson told police that he took Dodson and a customer, Charles Himes, into the men's room at the end of the bar, intending to tie them up with electrical cord. The customer lunged at Johnson and he began firing wildly, shooting both men. He then returned to the bar and cleaned out the cash drawer, also taking Dodson's gun, which was kept under the bar. As he was wiping the bar surfaces to remove fingerprints, Johnson heard movement from the back room and returned to

find the customer still alive. Johnson shot him again, not, according to Johnson, "to see him dead," but to "stop his suffering." See opinion of the Florida Supreme Court. (Appendix #1, pp. 1-6)

Johnson was tried on an indictment charging two counts of first-degree murder. He admitted the killings but claimed they were provoked by the customer's attack and denied all premeditation. He was convicted of second-degree murder for the death of the customer and of first-degree murder in Dodson's death. On the first-degree conviction the jury recommended and the trial court imposed the death penalty. See opinion of the Florida Supreme Court. (Appendix #1, pp. 1-6)

The trial court excused two jurors for cause based on their feelings about the death penalty. Both jurors used equivocal language when describing their opinions.

In order to show firing range, the state introduced at trial an experiment consisting of test firings showing powder markings on paper backed by cardboard. The defense objected because gun powder markings which occur on paper are not the same as those which occur on skin or clothing. The state did not introduce any evidence that the test markings were similar to the markings which would be made on skin or which were made on the bartender's body. The trial court allowed the evidence on the ground that the issue was one of the weight to be given evidence rather than its relevance or materiality. The Florida Supreme Court affirmed on the same grounds, receding from a previous decision.

When the trial transcript was first transmitted to the Florida Supreme Court is was clearly deficient. According to the Florida Supreme Court's opinion,

> ...the transcript of the trial court proceedings was discovered to be virtually incomprehensible because of omissions (including omissions of several bench conferences and the entire voir dire of the venire panel), misspellings, and obvious inaccuracies in either the recording or the transcription of the trial.

The Florida Supreme Court granted a motion to remand for a hearing to consider the state of the transcript. On remand the court approved a transcript revised by the court reporter concluding that Petitioner had not proven specific error, omissions, corrections or additions which should have been made to the revised transcript. Petitioner was and is represented by an appellate counsel different from trial counsel because the state public defender system designates specific public defender offices to handle appeals. Section 27.51, Florida Statutes (1979).

QUESTIONS PRESENTED

I.

WHEN APPELLATE COUNSEL IS NOT THE SAME AS TRIAL COUNSEL BY OPERATION OF STATE LAW, MUST SPECIFIC TRIAL TRANSCRIPT INACCURACIES BE PROVEN TO DEMONSTRATE INADEQUATE APPELLATE REVIEW, OR IS IT SUFFICIENT TO PROVE THAT THE TRANSCRIPT IS UNRELIABLE AND CONTAINS SUBSTANTIAL OMISSIONS?

A. SUMMARY OF ARGUMENT.

Because of deficiencies in the court reporter's performance the trial transcript is not complete or reliable. It cannot be accurately reconstructed. Bench conferences which the trial judge and defense counsel believed were being reported do not appear in the transcript. An undetermined portion of the trial court's instructions to the jury are missing. The transcript is not a correct verbatim report of the trial proceedings. It is impossible to know if it is a correct report of the gist of the proceedings.

Petitioner is prejudiced because neither appellate counsel nor a reviewing court can fully review the trial proceedings for error with any confidence that the facts relied on are correct or complete.

The Florida Supreme Court's opinion conflicts with the opinion of the Fifth Circuit Court of Appeals in United States v. Selva, 559 F.2d 1303 (5th Cir. 1977).

The Fifth Circuit in Selva held that where counsel on appeal is different than trial counsel specific prejudice need

not be shown from transcript deficiencies. A demonstration of substantial omissions is sufficient to require a new trial.

Though the state public defender system by state statute operated to designate a different appellate counsel to handle Petitioner's appeal, Section 27.51, Florida Statutes (1979) the Florida Supreme Court required Petitioner to prove specific omissions, inconsistencies, or inaccuracies which prejudice his case.

B. THE PROCEEDINGS ON REMAND.

The Florida Supreme Court granted a motion to remand to consider the transcripts when it concluded that the first version submitted to it was "virtually incomprehensible," with "obvious inaccuracies in either the recording or transcription of the trial."

Unfortunately, the reporter used only a stenograph machine, and reported the trial without a backup tape recorder. The reporter was ordered to compare her stenographic notes to the first version of the transcript, and submit revisions as needed.

Petitioner requested that an independent and expert court reporter be allowed to review selected passages of the reporter's stenographic notes to determine whether the second version of the transcript accurately reflected the reporter's stenographic notes. The presiding judge refused. Thus the best chance of obtaining a reliable record was lost.

The judge refused to allow examination of the notes or to hear testimony about them. However, after the proceedings on remand were entirely completed, the judge allowed an examination but refused to entertain a motion for rehearing. Counsel examined the stenographic notes with a volunteer court reporter who transcribed selected passages.

Petitioner filed a second motion to remand in the Florida Supreme Court (Appendix #5, pp. 12-23) based on an affidavit from the expert. The expert's transcription of the notes reveals that the notes are almost identical to the first "incomprehensible" version of the transcript. The motion to

remand which contains comparisons of the expert's transcription of the notes to the revised transcripts is in the appendix to this Petition. (See Expert's Affidavit, Appendix Item #6, pp. 24-27).

A memory expert, testified that some of the gist of the trial could be reconstructed but there is no way of knowing "whether somebody just recreated something that made sense." (R 1716)

Amazingly enough the reporter admitted at the evidentiary hearing that she revised the transcript based on whether she thought it made sense. (R 1498) But she doesn't know how many or which corrections she made on this basis. (R 1498) Such revisions are no more than invention.

At some point during her revision of the transcripts, unknown to appellate counsel and without order from the presiding judge, a meeting was held during which the reporter, the trial judge, the prosecutor and trial defense counsel discussed the transcript. The reporter said she called the meeting because she "wanted to go over a few of the bench conferences and make sure they were correct." (R 1499) The meeting resulted in at least one change to the transcript. The reporter said that she didn't want to make the change, and that her notes had something else. (R 1503) The reporter doesn't "think" there were other changes based on the meeting. (R 1504) This, of course, is not to say there were no other changes. No one is able to remember how many or which passages were discussed or what was said. No record of the meeting was made. Defense counsel thinks testimony and not bench conferences were discussed. (R 1486)

The memory expert testified that memory does not just fade but actually changes with the passage of time and receipt of post-event suggestions. She indicated that the meeting called by the court reporter was "just the kind of situation in which one would expect to see an influence due to post-event information...[It] would be extremely difficult to figure out whether the information as a result of that meeting is accurate or inaccurate." (R 1712-1713)

A few examples demonstrate the unreliability of the transcript and the reporter's attempts to revise in order to make the transcript make sense.

The following changes were noted by the court reporter: (The typed portion of what follows is the first version of the transcripts. The handwritten words are the reporter's revision accepted on remand.)

A What we refer to in this particular instance is actually primer residue, barium antimony is coming from the primer portion of the cartridges. That is, primer is a small charge sitting at the base of the shell which is ~~designated~~ detonated by the firing pin of the weapon. Once this small charge is ~~designated~~ detonated it ignites the powder which is the propellant for the projectile.

Now, when this primer is ~~designated~~ detonated it mixes with the ~~designated~~ detonated powder and ~~spun~~ is spewed out around the weapon and ~~drops this~~ deposited on any surface very near the discharged weapon. For instance, hands or any other surface which would be very near to the discharging of the weapon.

"Designated" and "detonated," are similar in sound. The reporter may have thought she heard "designated" but changed it to "detonated" because she thought it made more sense in context. This conclusion is further supported by the fact that in lines 15-17 the expert referred to "primer" as being "detonated" and "powder" as being "ignited." Thus the inference may be drawn that in lines 18-20 the expert did not use "detonated" to modify "powder." It further appears that the change of "spun" to "is spewed" (words somewhat similar in sound) then motivated (for grammatical purposes) the change of "drops this" to "deposited."

A different kind of example may be found:

THE COURT: If the Court finds a Richardson violation, ~~[illegible]~~ But, it's my finding that last Wednesday Mr. Bingham learned of Mr. Caswell's existence by talking to the trooper by telephone

The trial judge who allegedly spoke the deleted words was unable to explain how they appeared in the transcript. (R 1421-1422) The deletion of the phrase "remains subsequent on our side" yields a sequence of words which makes more sense. But, what was it the reporter heard, or thought she heard? Did she hear part of a sentence which contained "remains subsequent on our side?" Did she invent the phrase? The necessity to ask these questions indicates that the transcript is not reliable.

The reporter apparently used court documents, not just her notes as the court ordered, while making her revisions. The original transcription of the court's charge although not comparing exactly to the written instructions of the record departed strikingly from the previous pattern of errors. The reporter admitted that she had the court file and the written instructions when she revised the transcript though she did not "recall" if she made changes based on the written jury instructions. (R 1497-1498, 1504-1505) Additionally, defense counsel testified that he recalled the trial judge became tongue tied while giving the instructions, and told the jury he would start over, but that this event was not reported. (R 1464) The problem with the reporter's use of written documents is, of course, that there is no way to know whether what the jury heard is the same as the written documents.

C. KNOWN AND SUSPECTED ERRORS AND OMISSIONS.

1. Unusual Omissions of Bench Conferences:

Bench conferences are omitted from the voir dire examination in great number. They are randomly omitted from the testimony phase of the trial. Unusually, however, defense counsel testified that bench conferences occurred when the reporter was present but which do not appear in the transcript. About one of these conferences he said:

> And I particularly remember thinking to myself, "It's a good thing this court reporter is up here, because I have no idea what these people [prospective jurors] are going to say up here." (R 1466)

At trial, the trial judge thought that the reporter was present and that all conferences were being reported. (R 1404-1418).

The witnesses, at the hearing on remand, were not able to say how many bench conferences were unreported or what was said. The trial judge was uncertain about the content of the bench conferences during the testimony of the trial:

> My own impression was that there was not much important of a legal nature that was discussed at these bench conferences that did not later appear in some fashion on the record, either through the specific nature of the objection or my ruling. That's not to say there wasn't... (R 1410) (Emphasis added)

When asked about a conference which appeared to be about the admission of a diagram attached to a written statement by the defendant, the judge said:

> I am almost confident that no new grounds other than those previously made in the Motion to Suppress and the two objections appearing here on the record were raised at that bench conference. But I have no specific recollection. (R 1413) (Emphasis added)

The judge distinguished the conferences which occurred during the voir dire, and was not able to say that most of the important legal matters there were reported. (R 1411)

2. Omissions Suspected from the Context:

Omissions more subtle in nature are suspected based upon the context of the language in the transcript.

For example, the transcript reports that a medical examiner described a head wound as follows:

> In the gunshot wound to the head, which was a three-eighths inch wound, since it was a close gunshot wound, it had one-sixteenth of an inch, was black in margin and had purple red tattooing or stippling if you will, for up to one-half inch around it. (R 44)

The transcript omits the object referred to by the phrase, "it had one-sixteenth of an inch."

3. Inaccuracies suspected from the context:

It is suspected that there are inaccurate transcriptions because some statements made by individuals don't appear to make sense.

For example, the transcript reports that a ballistics expert testified as follows:

> And another set of swabs were blank or just a swab used to identify the agent which was used in the swabbing procedure, it was wetted in the cotton swab

to assure there was no contamination in the collection, and analysis of the swabs revealed the presence of both barium antimony, and the cotton swabs labeled upper and lower swab in the concentration were consistent with gunshot residue. (R 167)

The transcript does not indicate what "the concentration" is. Should "collection" be substituted for "concentration?" Or, should the punctuation of the statement be different?

The same witness said that primer residue would be deposited "very near" a weapon. (R 167) Yet the transcript reports that the expert also said that residue was "very rarely seen within [sic farther than?] a couple of feet of the discharging weapon..." (R 168, line 22).

The character of the changes also demonstrates the unreliability of the transcripts. Some of the changes drastically alter the entire meaning of a passage. For example at page 110:

THE COURT: Something else that ties into it makes it relevant. Because, I understand the defendant fired up with the magnum, somehow, against the wall and fired. Is it relevant, really prove anything?

It is hard to imagine a more drastic change, or one so potentially important to the reliability of the physical evidence in the case. It is one thing for a defendant to shoot a gun, but when a medical examiner shoots a gun at a crime scene the interpretation of the physical evidence can be vastly different. Strangely, after claiming at the evidentiary hearing that the transcript "should" accurately reflect her notes (R 1497), the reporter admitted that "medical examiner" appeared in her notes but that she changed it at the meeting she called, though she did not want to. How many other passages did she change that she didn't want to? The reporter doesn't "think" there are others. She apparently doesn't know. (R 1503-1504)

The state sought to establish that the gist of the proceedings was correctly reported. The trial judge testified that he thought it was substantially correct. However, throughout his testimony he used equivocal language. Among his comments was the following:

> "But if you read the whole thing as a whole, it's probably not too far from substantially correct." (R 1414)
>
> Yes, sir; it is, except for the unreported bench conferences, as the court reporter put it, where the challenges were exercised and the court ruled on some of them. And that is not in the record. But otherwise, that record is substantially correct in my opinion. (R 1426-1427)

Defense counsel's testimony was:

> Q: It is substantially correct?
>
> A: It's grossly correct; right. The people were there, and they testified pretty much --
>
> Q: To the best of your recollection.
>
> A: Yeah, to the best of my recollection, which isn't very good. (R 1486-1487)

D. PETITIONER IS PREJUDICED BY THE POOR CONDITION OF THE TRANSCRIPT.

Through no fault of Terrell Johnson, the transcripts are not reliable or complete. They cannot be corrected because there was no back-up machine to the reporter's stenograph, the reporter is incapable of correcting them, and trial counsel and the trial judge cannot sufficiently remember the trial. We are able to tell confidently from the transcripts only that "the people were there [at the trial] and they testified pretty much [as in the transcript]."

Terrell Johnson has a constitutional right to a complete transcript on appeal. Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, 55 ALR2d 1055 (1956), Mayer v. Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971). In a capital case, the 5th, 6th, 8th, and 14th Amendments to the United States Constitution, demand a verbatim, reliable transcript of all proceedings in the trial court.

The right to a transcript on appeal is meaningless unless it is an accurate, complete, and reliable transcript. New appellate counsel, who was not at the trial proceedings in this cause, has no means to fully review the proceedings below with a defective transcript, and thus, cannot render effective assistance. See Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976); Barclay v. Florida, ___ U.S. ____, 77 L.Ed.2d 1134, 103 S.Ct. ____, (1983), for the proposition that meaningful appellate review is essential in a death penalty case. See, generally, Hardy v. United States, 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed.2d 331 (1964), where the Court held that the duties of an attorney could not be discharged on appeal without a whole transcript.

The omissions and inaccuracies in the transcripts in their current condition are substantial, and Petitioner is prejudiced thereby.

The jury charge is incomplete. We know what appears in the written instructions, but we cannot know what the judge told the jury. We cannot know if fundamental error was committed.

Many bench conferences are omitted, though the trial judge and defense counsel believed they were being reported. We cannot know what was said, what objections were made, if objections were made, and what rulings were made, if rulings were made.

We do not know what words a witness spoke since it appears words were omitted, and we cannot rely on the accuracy of the transcript.

Confidence in the precise reporting of what a prospective juror says is especially important when reviewing the issue raised elsewhere in this Petition of whether two jurors should have been excused for cause in light of their attitudes about the death penalty. The entire meaning of what a juror says can be drastically changed by one omitted or inaccurately transcribed word. For example, contrast "I would not automatically vote against the death penalty" with "I would automatically vote against the death penalty," or "I probably wouldn't automatically vote against the death penalty."

Crucial to issues raised elsewhere in this petition of whether the introduction of a ballistics experiment prejudiced Petitioner and whether the trial court was correct in finding aggravating circumstances is the precise testimony of the medical examiner. It is probable that the reporter omitted words in his testimony. The transcript reports the medical examiner as saying:

> In the gunshot wound to the head, which was a three-eighths inch wound, since it was a close gunshot wound, it had one-sixteenth of an inch, was black in margin and had purple red tattooing or stippling if you will, for up to one-half inch around it. (R 44)

What was it that "had one-sixteenth of an inch?" Was it sooting? Was it tearing? Was it a different kind of tattooing? Each answer would ostensibly indicate a different kind of wound. In turn counsel may be required to change his argument to the changed facts.

Further because the transcript cannot be relied on for accuracy we cannot know if the wound was "three-eighths of an inch" as reported or if the stippling was up to "one-half inch around." If the medical examiner testified differently as he may very well have, counsel's and this Court's perception of the facts would be very different. Is the rest of the medical examiner's testimony accurate?

Is the testimony about the physical evidence collected correct? Precise information is absolutely essential to accurate argument for a reviewing court. But we cannot be precise. Did the medical examiner really shoot the gun at the scene? If not what did he do? Why did the trial judge say in the reporter's notes that the "medical examiner" messed up?

It is apparent that Petitioner and a reviewing court cannot rely on the accuracy of the record to support argument, and Petitioner cannot know what arguments he cannot perceive because the facts are unreported. In a death penalty case the transcript should be reliable, and when appellate counsel is different from trial counsel a demonstration of unreliability of the transcript should be sufficient to require a new trial.

II.

MAY JURORS BE EXCUSED FOR CAUSE UNDER WITHERSPOON v. ILLINOIS, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968) WHEN INDICATING EQUIVOCAL FEELINGS ABOUT THE DEATH PENALTY BY ALTERNATING STATEMENTS OF OPEN MINDEDNESS AND UNCERTAINTY WITH SUCH STATEMENTS AS "I DON'T THINK I COULD RECOMMEND THE DEATH PENALTY" AND "I PROBABLY WOULD AUTOMATICALLY RECOMMEND LIFE?"

The Florida Supreme Court's opinion allowing jurors to be excused for cause is in conflict with the decisions of the Fifth Circuit Court of Appeal in Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981), and the Eleventh Circuit Court of Appeal in Witt v. Wainwright, 714 F.2d 1069 (11th Cir. 1983). Both circuit court cases held that juror responses such as "I don't think I could [vote to inflict the death penalty] are insufficient to excuse a juror for cause.

The trial court should not have excused for cause prospective jurors Ms. Horne and Mrs. Bowman. (The complete voir dire examination of both jurors is in the appendix to this Petition, See Appendix Item #7, pp. 28-40).

THE VOIR DIRE

A. MS. HORNE.

The voir dire examination revealed that Ms. Horne had deeply mixed feelings about the death penalty. She was definite, however, that she could fulfill her duty as a juror and not automatically vote against the death penalty. She was uncertain as to whether she would recommend the death penalty if, hypothetically, she had to act alone rather than as just part of a twelve person jury. She made that uncertainty apparent by using equivocal language. She, therefore, should not have been excused for cause.

HER MIXED FEELINGS:

Ms. Horne clearly and repeatedly indicated her ambivalent feelings about the death penalty.

> MS. HORNE: I am kind of mixed. I can see it could be a deterrent and then again, I am not in favor it. I would not automatically --
>
> THE COURT: Wouldn't automatically vote against it?
>
> MS. HORNE: (Nodded in the negative.) (R 1094)

She said her mind was open. (R 1095)

ABILITY TO FULFILL JUROR'S DUTY:

Ms. Horne was definite that she wouldn't automatically vote against the death penalty. (R 1094) She was definite that she could vote for a verdict of guilt or innocence. She had no personal reservations about her ability to "deliberate in the jury room and vote one way or the other" (R 1095), and she would not "be a nervous Nellie and say, I can't vote." (R 1095-1096) She could put personal feelings about the death penalty aside and reach a verdict as to guilt or innocence, "even though the jury...might recommend death and [the]...Court might impose death." (R 1095) She said she would not hold out for a second degree murder verdict "because I won't be doing the sentencing." (R 1096)

MS. HORNE'S EQUIVOCAL FEELINGS ABOUT ACTING ALONE TO RECOMMEND DEATH:

Though it is a juror's duty to act as one of a group rather than to act alone, the prosecutor, wanted to know what Ms. Horne would do it she were to act alone.

> MR. SMALL: Could you, irrespective of how anyone else felt about it, could you yourself recommend the death penalty? (R 1097)

She was uncertain about recommending the death penalty and thus she used equivocal language to respond to the remaining questions. She didn't "think" she could recommend the death penalty. (R 1097) She "probably" would automatically recommend life. When asked by defense counsel to imagine the "worst possible murder" she said that she "probably" would not recommend death. That she "probably" would automatically recommend life and "probably" would not recommend death indicates, of course, that she might "recommend" death.

Her equivocation is in fact profound. Interspersed throughout these statements, equivocal in themselves, are over-riding qualifications for each of the statements. To the judge she said, "Well, I thought you said before you would do the actual sentencing." (R 1097) To the defense attorney she said, "It's really hard to say without the circumstances,..." (R 1098)

B. MRS. BOWMAN.

Mrs. Bowman was ambivalent about the death penalty, and equivocal when she expressed her feelings about her ability to return an advisory verdict recommending death.

She said she was "not quite sure" concerning her "religious beliefs against the death penalty." (R 1319) It would "bother" her to know that her belief in a person's guilt would bring about a death sentence. (R 1319) "I don't think I would want to be responsible for a person's death." (R 1322)

Her statements about advising death were distinctly equivocal. "I don't think I could do that [advise death]. I think I would want to ... well ---" (R 1319-1320) "I think I probably would [automatically vote against death]." (R 1320) When asked if she could "remove" her "personal feelings" and follow the law which would "require you return an advisory sentence of death," she responded, "I honestly don't think I can answer that." (R 1322) When pushed to answer she said, "Well, I am trying to say, I don't think I could do that." (R 1322) (Emphasis added)

Mrs. Bowman began her comments by indicating that she was "not quite sure" about her death penalty views. Her equivocal statements continued throughout. Uncertainty was, therefore, the dominant characteristic of her testimony.

APPLICATION OF LEGAL PRINCIPLES TO THE FACTS

The principles announced in Witherspoon are settled and clear. Jurors who hold conscientious scruples against the death penalty may not be excused for cause unless they make it,

> ...unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Witherspoon v. Illinois, supra, 391 U.S. at 522 Footnote 21. (Emphasis added on "vote")

> Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal it simply cannot be assumed that is his position. Witherspoon v. Illinois, supra, 391 U.S. at 515 Footnote 9.

In Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981), the trial court excused a prospective juror for cause.

> He [the juror] was first asked whether he had conscientious scruples against the infliction of the death penalty, whereupon he stated, "I don't know what that means." When asked if he could ever vote to inflict the death penalty, he replied, "No, I don't think I could." Then, in response to the question, "You just don't feel like you would be entitled to take another person's life in that fashion?" He nodded and then said, "No, I could not." Id. 655 F.2d at 677.

The Court went on to hold:

> These questions and answers fall far short of an affirmation by...[the juror] that he would automatically vote against the death penalty regardless of the evidence, or that his objections to capital punishment would prevent him from making an impartial decision as to guilt. Id. 655 F.2d at 677.

The court in Witt v. Wainwright, 714 F.2d 1069 (11th Cir. 1983), held that a juror could not be excused for cause where the juror responded that she did not "think" she could put aside her feelings against the death penalty.

Both Ms. Horne and Mrs. Bowman used the same type of equivocal language used by the jurors in Granviel and Witt, and therefore, should not have been excused.

III.

IN THE CIRCUMSTANCES OF THIS DEATH PENALTY CASE, IS IT A VIOLATION OF DUE PROCESS TO ALLOW THE STATE TO INTRODUCE AS EVIDENCE ON THE MOST CRUCIAL TRIAL QUESTIONS A TEST SHOWING GUN POWDER MARKINGS ON PAPER WITHOUT PROVING THAT MARKINGS ON PAPER ARE SUBSTANTIALLY SIMILAR TO THOSE WHICH WOULD BE MADE ON SKIN?

A. SUMMARY OF ARGUMENT.

The crucial fact to be determined by the jury in this case was whether the killings were premeditated. The state argued that the shootings were execution style and thus premeditated. It, therefore, introduced a ballistics experiment to show the distance from which the shots were fired at the deceaseds. The experiment, conducted by a police technician, not a ballistics expert, consisted of test firings showing powder marks on paper backed by cardboard. The test demonstrated the width

and consistency of the markings. It was not relevant, and was misleading because gun powder markings which occur on paper are not the same as those which occur on skin or clothing. Petitioner was harmed because the experiment mislead the jury into believing that the bartender was shot with the gun pressed against his head. The physical evidence, however, if accurately portrayed proves at best that the shot could have been fired from as much as two feet away. The faulty experiment was consistent with the state's execution theory, and was inconsistent with the defense theory of second degree murder.

The introduction of such highly unreliable evidence on such crucial issues is a violation of due process under the 14th Amendment, Green v. Georgia, 442 U.S. 95, 60 L.Ed.2d 738, 99 S.Ct. 215 (1979), and does not comport with the need for reliability in a death case as required by the 8th and 14th Amendments, Woodson v. North Carolina, 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976).

B. THE ADMISSIBILITY OF THE EXPERIMENT AND ITS HARM.

Even though the state did not prove that test firings on paper are substantially similar to those which would be made or skin or cloth, the Florida Supreme Court ruled that the experiment could be admitted over objections as to relevance because it ruled the question is one of the weight to be given the evidence.

In doing so, the court receded from its previous decision of McClendon v. State, 105 So. 404 (Fla. 1925), where it held:

> In the case before us there is no evidence that the effect of the gunfire on the paper and cloth targets would be essentially similar to, or would even approximate, the effect of such gunfire upon the human flesh in respect to resulting burns and powder marks. Upon this most essential feature of the evidence we are left entirely to conjecture. Under the facts and circumstances of this case, and in the absence of qualified and credible evidence that the effect of pistol shots upon human flesh and upon paper or cloth targets would be essentially similar in respect to resulting powder marks and burns, we cannot assume that there is sufficient similarity between human flesh and paper

> or cloth, in texture, substance, vulnerability, or susceptibility, to render such targets either helpful or enlightening as evidence. Nor can we assume that the effect of pistol fire upon human flesh and upon paper or cloth targets would be essentially similar, in respect to resulting powder burns or marks, when the requisite supporting proof is lacking. Id. 105 So. at 409.

The dissimilarity between the characteristics of the paper target and the deceaseds' skin and clothing, were not the only problems with the experiment. The policeman did not testify that he used the same gun powder or ammunition of the same character in weight, power, and configuration. He shot into a target hung on clips, and did not testify whether such a suspended target would offer the same resistance to gun powder impact as the human body would.

The harm of the experiment was that it mislead the jury into concluding that the prosecutor was right about the premeditation, and that the gun was pressed tightly against the bartender's head when it was fired. This was the only conclusion the jury could reach when considering the experiment in combination with the medical examiner's testimony. On a "contact" shot the experiment shows dark marks of some type surrounding a hole in the cardboard in a circle of one inch diameter. The technician, perhaps because he was not an expert, incorrectly and misleadingly testified that the marks were "stippling." (R 99) The medical examiner testified that stippling is abrasions in the skin caused by the impact of gun powder discharged along with the bullet at the time a gun is fired. (R 44) Describing the bartender's head wound, the transcript indicates the medical examiner said:

> In the gunshot wound to the head, which was a three-eighth inch wound, since it was a close gunshot wound, it had one-sixteenth of an inch, was black in margin and had purple red tattooing or stipplings if you will, for up to one-half inch around it.

Comparing the stipplings on the head wound to the marks on the paper experiment, which the jury erroneously was told was stippling, and the medical examiner's testimony: the "further...

you get away from the muzzle the wider the array of stippling" (R 44), the jury had to conclude that the bartender was shot with the pistol pressed hard against his head.

The presence of stippling around the wound, however, does not necessarily mean that the bartender was shot at a range from contact to two inches. Stippling may be present when a gun is shot up to two feet away.

The medical examiner perhaps mistakenly referring to "sooting" testified that, "If you get far away, the stippling disappears, usually six, seven inches, depending on the gun." (R 44) Stippling, however, can occur up to two feet away. The author in 2 Forensic Sciences, pp 25-28 §25.04(a)(C. Wecht ed. Mathew Bender 1981) states:

> At medium ranges, from one-half to six inches, the wound will be surrounded by or contain both soot and gun powder marks. Soot is not seen around the wound when the range exceeds six inches, while powder marks may be seen up to 2 feet. The gun powder marks consist of peppered-like, dotted bruises and/or abrasions. These lesions, called "satellites" or "stippling", are produced by grains of burnt and unburnt powder striking the skin. Some of the grains of powder became actually embedded in the skin and may be demonstrated under the microscope. The maximum range at which stippling may be produced is 2 feet, though in the majority of cases it is not seen in excess of 18". The intensity of the stippling varies not only with the range, but also with the type of handgun, the ammunition type, and the type of gun powder. Ball gun powder, for example, still shows stippling marks at ranges which flake gun powder stippling disappears altogether. The further the range, the wider the stippled area will be.

The experiment was harmful and crucial in both the innocence/guilt phase of the trial and the penalty phase.

There were no eyewitnesses to the shooting other than Petitioner. It was the state's position that Petitioner killed the customer and an unresisting bartender in an "execution style" and in a "cold and calculated" manner, and that the experiment proved it. (R 286-287) On the other hand the defense position at trial was that at most Petitioner could be found guilty of second degree murder, because when he took the bartender and customer back to the restroom to tie them up the customer lunged

at Petitioner, and Petitioner, scared and in a frenzy "just started shooting" in rapid succession. (See e.g. closing argument of counsel, R 271-273). Under these circumstances testimony as to the distance the pistol was located from the bartender's head at the time it was fired was of critical importance.

The question under the circumstances is of admissibility not weight. Allegedly "scientific" experiments carry with them an aura of credibility and persuasiveness to a lay jury, and are thus especially likely to be misleading if inaccurate. Therefore, the court should determine the substantial similarity of the experiment before allowing the jury to consider it. In this case, the evidence was critical and so unreliable that the court should not have admitted it, and the question is of constitutional import.

CONCLUSION

Upon the foregoing reasons, Petitioner prays that this Court grant a Writ of Certiorari.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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MEMBER OF THE BAR OF THE
UNITED STATES SUPREME COURT

APPENDIX

ITEM:		PAGE NO.
1.	Opinion of the Supreme Court of Florida in Johnson v. State, 442 So.2d 193 (Fla. 1983)	A 1
2.	Order of the Supreme Court of Florida denying rehearing in Johnson v. State, 442 So.2d 193 (Fla. 1983)	A 7
3.	Section 921.141, Florida Statutes (1981)	A 8
4.	Section 27.51(4), Florida Statutes (1979)	A 10
5.	Petitioner's Second Motion to Remand	A 12
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Aetna is obligated to pay the award against Wackenhut.

In his concurring opinion to *U.S. Concrete* Justice Ehrlich states that, in order to find an employer vicariously liable for an act of its employee, *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545 (Fla. 1981), requires that some fault on the employer's part be found. The jury in the instant case, because of the instructions given here, must have found some fault on Wackenhut's part. In assessing punitive damages against Wackenhut the jury sought to punish it for its misdeeds. If insurance pays this award, Wackenhut is not being punished. A finding that this insurance policy provided coverage for punitive damages thwarts the jury's reason for imposing them. I would quash the holding of the district court in this case.

OVERTON, J., concurs.

Terrell M. JOHNSON, Appellant,

v.

STATE of Florida, Appellee.

No. 59811.

Supreme Court of Florida.

Nov. 23, 1983.

Rehearing Denied Jan. 18, 1984.

Defendant was convicted in the Circuit Court, Orange County, Rom W. Powell, J., of first-degree murder and sentenced to death, and he appealed. The Supreme Court held that: (1) remand for new trial due to reconstruction of record was not required; (2) admission of testimony by police officer about results of experiments he conducted with murder weapon was not error; (3) exclusion for cause of prospective jurors was proper; (4) defendant waived his right under Interstate Agreement on Detainers to be brought to trial within 120 days after entering custody of State of Florida; (5) evidence was sufficient to support findings of statutory aggravating factors; and (6) instruction to jury, as to statutory aggravating factor, that felonies of attempted robbery and attempted murder of which defendant had been convicted were as matter of law felonies involving use or threat of violence was not erroneous.

Affirmed.

Shaw, J., dissented and filed opinion.

1. Criminal Law ⇐1181

Notwithstanding inconsistencies and omissions between original and corrected transcripts of trial, and time elapsed between trial and reconstruction of record of trial, remand for new trial was not required in prosecution for first-degree murder, in that defendant was unable to point to any omission, inconsistency, or inaccuracy which prejudiced presentation of his case, and, at evidentiary hearing on accuracy of reconstructed transcript, trial judge, court reporter, and both trial attorneys testified to substantial accuracy and completeness of reconstructed record in all material regards. West's F.S.A. R.App.P.Rule 9.200(f).

2. Criminal Law ⇐388

Issue as to results of experiments conducted with murder weapon is one of weight to be given evidence rather than its relevance or materiality.

3. Criminal Law ⇐388

Admission of testimony by police officer about results of experiments he conducted with murder weapon was not error; receding from *McClendon v. State*, 90 Fla. 272, 105 So. 406.

4. Jury ⇐108

Even though neither of two venire women stated on record that she would automatically vote against imposition of capital punishment, totality of their testi-

mony showed that excusing such women for cause was proper, where review of voir dire showed that both women made unmistakably clear that they would automatically vote against imposition of capital punishment without regard to any evidence that might be developed at trial and that their attitude toward death penalty would prevent them from making impartial decision as to defendant's guilt.

5. Extradition and Detainers ⇐59

Limit of 120 days for bringing defendant to trial contained in Interstate Agreement on Detainers is neither unwaivable nor self-executing, since constitutional right to speedy trial upon which limit is based is neither unwaivable nor self-executing. West's F.S.A. § 941.45.

6. Criminal Law ⇐577.5

Speedy trial rule protects constitutional right enunciated in Florida's Declaration of Rights. West's F.S.A. RCrP Rule 3.191; West's F.S.A. Const. Art. 1, § 16.

7. Criminal Law ⇐577.10(9, 10)

Fundamental right to speedy trial is neither unwaivable nor self-executing. West's F.S.A. Const. Art. 1, § 16.

8. Extradition and Detainers ⇐61

Underlying policy of Interstate Agreement on Detainers is to enhance possibility of rehabilitation by resolving all outstanding charges against convict regardless of which state has filed charges. West's F.S.A. § 941.45(1).

9. Extradition and Detainers ⇐60

Defendant waived right to be brought to trial within 120 days after entering custody of State of Florida, pursuant to Interstate Agreement on Detainers, where defendant failed to raise State's failure to bring him to trial within 120-day limit at time trial was continued from its originally scheduled date or at any time before bringing appeal. West's F.S.A. §§ 941.45, 941.45(1); West's F.S.A. RCrP Rule 3.191; West's F.S.A. Const. Art. 1, § 16.

10. Criminal Law ⇐1208.1(6)

Evidence was sufficient to support findings, as statutory aggravating factors for imposition of death sentence, that murder was committed in cold, calculated, premeditated manner, murder was committed to avoid lawful arrest, murder was committed during robbery and for pecuniary gain, defendant was under sentence for another crime at time murder was committed, and defendant had previously been convicted of felonies involving use or threat of violence.

11. Criminal Law ⇐1208.1(6)

Since attempt to commit crimes of robbery and murder must inherently involve threat of violence, instruction to jury, as to statutory aggravating factor, that felonies of attempted robbery and attempted murder of which defendant had been convicted were as matter of law felonies involving use or threat of violence was not erroneous, notwithstanding contention that reliance on such factor was erroneous in absence of evidence of actual violence used or threatened by defendant.

James B. Gibson, Public Defender and Ronald K. Zimmet, Chief Asst. Public Defender, Seventh Judicial Circuit, Daytona Beach, for appellant.

Jim Smith, Atty. Gen., and Mark C. Menser and Evelyn D. Golden, Asst. Attys. Gen., Daytona Beach, for appellee.

PER CURIAM.

This is an appeal from a conviction for first-degree murder and sentence of death. We have jurisdiction. Article V, § 3(b)(1), Fla. Const. We affirm the conviction and the sentence.

On December 4, 1979, Terrell Johnson went to Lola's Tavern in Orange County to redeem a pistol he had pawned to James Dodson, the bartender/owner of the tavern. Although Dodson had given Johnson fifty dollars when the gun was pawned, he demanded one hundred dollars to return it. Before paying for the gun, Johnson asked to be allowed to test fire it and took the gun to an open field across the road from

the bar where he fired several shots. While returning to the bar, Johnson, irate at what he considered to be Dodson's unreasonable demand, decided to rob the tavern. Johnson told police that he took Dodson and a customer, Charles Himes, into the men's room at the end of the bar, intending to tie them up with electrical cord. The customer lunged at Johnson and he began firing wildly, shooting both men. He then returned to the bar and cleaned out the cash drawer, also taking Dodson's gun, which was kept under the bar. As he was wiping the bar surfaces to remove fingerprints, Johnson heard movement from the back room and returned to find the customer still alive. Johnson shot him again, not, according to Johnson, "to see him dead," but to "stop his suffering."

Several weeks later Johnson was arrested in Oregon for an unrelated crime. He still had Dodson's gun—he had sold the murder weapon to an acquaintance in Florida—and thus was linked to the Florida murders based on information from the National Crime Information Center.

Johnson was tried in Orange County on an indictment charging two counts of first-degree murder. He admitted the killings but claimed they were provoked by the customer's attack and denied all premeditation. He was convicted of second-degree murder for the death of the customer and of first-degree murder in Dodson's death. On the first-degree conviction the jury recommended and the trial court imposed the death penalty.

The case was first appealed to the Florida Supreme Court in 1980. At that time the transcript of the trial court proceedings was discovered to be virtually incomprehensible because of omissions (including omissions of several bench conferences and the entire voir dire of the venire panel), misspellings, and obvious inaccuracies in either the recording or the transcription of the trial. This Court therefore relinquished jurisdiction to the trial court to attempt to reconstruct the record and to hold an evidentiary hearing on the accuracy of the transcript. The court reporter revisited her stenographic notes and met with the trial judge and trial counsel. The corrected and supplemented transcript was the subject of extensive hearings into its accuracy and reliability. At the close of those hearings, the presiding judge found the corrected transcripts to contain "no significant or material fault ... [nor to show] even one prejudicial omission or error" and issued an order submitting the revised transcript to this Court. It is this transcript upon which we rely in making our review of the record.

[1] This revised transcript is also the subject of appellant's first point on appeal. He refers to inconsistencies between the original and the corrected transcripts, to the time elapsed between the trial and the reconstruction, and to possible omissions which make effective assistance of appellate counsel and independent appellate review impossible. However, he is unable to point to any omission, inconsistency or inaccuracy which prejudices the presentation of his case. The reconstruction and the evidentiary hearing were conducted pursuant to the order of this Court and in compliance with Florida Rule of Appellate Procedure 9.200(f). At the evidentiary hearing the trial judge, the court reporter and both trial attorneys testified to the substantial accuracy and completeness of the record in all material regards. In the absence of some clear allegation of prejudicial inaccuracy we see no worthwhile end to be achieved by remanding for new trial.

Appellant's second point on appeal merits particular attention because it relates to the issue of the admissibility of certain evidence both as it was presented to the jury in support of the first-degree murder verdict and as it relates to the finding, as a statutory aggravating factor, that the murder was cold, calculated and premeditated. The state presented evidence that Dodson's death had been caused by a close-range execution-style shot to the back of the head. This evidence consisted of testimony by the medical examiner about the pattern of stippling around the wound and testimony by police officer Park about the results

of experiments he had conducted with the murder weapon. Park testified that he had fired the gun at white paper from various distances, and he described the marks made on the paper by the unexploded gunpowder discharged with the bullet. Park was not qualified as an expert witness and offered no opinion testimony. Neither did he attempt any comparison between the fatal wounds and the marks on the paper target.

Appellant cites *McClendon v. State*, 90 Fla. 272, 105 So. 406 (1925) for the proposition that admission of this evidence was prejudicial error. In *McClendon*, this Court ruled, on facts strikingly similar to those in the case at bar, that paper targets showing powder burns from shots fired at various ranges should not have been admitted into evidence on the issue of the range at which McClendon's alleged victim had been shot because it could not assume "that the effect of pistol fire upon human flesh and upon paper or cloth targets would be essentially similar, in respect to resulting powder burns or marks, when the requisite supporting proof is lacking." 90 Fla. at 280, 105 So. at 409.

[2, 3] The rule of "essential similarity" between test conditions and actual conditions first enunciated in *Hisler v. State*, 52 Fla. 30, 42 So. 692 (1906), has been eroded as to other types of experimental evidence since that time. *Jonks v. Corinthian Gardens, Inc.*, 406 So.2d 740 (Fla. 4th DCA 1981), *cert. denied*, 413 So.2d 876 (Fla. 1982); *Vitt v. Ryder Truck Rentals*, 340 So.2d 962 (Fla. 3d DCA 1976). We are convinced that the issue is one of the weight to be given the evidence rather than its relevance or materiality. We, therefore, recede from *McClendon* insofar as it holds such evidence inadmissible, and we find no error on the record now before us.

[4] Third, appellant raises a *Witherspoon* objection to the exclusion for cause of prospective jurors Horne and Bowman. While neither of these venirewomen stated on the record that she would "automatically vote against the imposition of capital punishment," *Witherspoon v. Illinois*, 391 U.S. 510, 516 n. 9, 88 S.Ct. 1770, 1774 n. 9, 20 L.Ed.2d 776 (1968), a review of the voir dire shows that they both made

> unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

Id. at 522-23 n. 21, 88 S.Ct. at 1777 n. 21 (emphasis in the original). The totality of their testimony shows that excusing these women for cause was proper.

Fourth, appellant argues that the trial court should have automatically dismissed the charges against him once the 120-day limits specified in the Interstate Agreement on Detainers (IAD), section 941.45, Florida Statutes (1979), had elapsed. Appellant was brought to Florida from Oregon, where he was serving a sentence, pursuant to the IAD. He was booked into the Orange County jail May 15, 1980 and brought to trial September 23, 1980, obviously more than 120 days after entering the custody of the State of Florida. During this period he was represented by counsel and the IAD documents were a matter of record. Nonetheless, the appellant agreed to a continuance of the trial date from August 12, when trial was originally scheduled. Appellant failed to raise the issue of the 120-day limit at that time or at any time before bringing this appeal.

[5-9] We cannot find any reason to hold the IAD's 120-day limit to be unwaivable and self-executing. Florida's speedy trial rule, Florida Rule of Criminal Procedure 3.191, protects a constitutional right enunciated in Florida's Declaration of Rights, article I, section 16, Florida Constitution. This fundamental right is neither unwaivable nor self-executing. We see no justification for granting greater dignity to a statutory provision designed to provide for cooperation between the states to effect the "expeditious and orderly disposition of ...

charges" against one in custody of another state. § 941.45, Fla.Stat. (1979). The underlying policy of the IAD is to enhance the possibility of rehabilitation by resolving *all* outstanding charges against a convict regardless of which state has filed the charges. *See* § 941.45(1), Fla.Stat. (1979). We find no merit in this issue.

[10] Appellant urges that the trial court erred in finding the homicide was committed in a cold, calculated and premeditated manner and that the homicide was committed to avoid lawful arrest. Appellant's basic premise is that the main evidence supporting these findings was the testimony of Officer Park. According to this argument, had Park's testimony been held to be inadmissible, the evidence would not have supported finding these aggravating factors beyond a reasonable doubt. As we have already ruled that Park's testimony was admissible, we also find these factors to have been properly found.

[11] We have reviewed the other aggravating factors relied upon by the trial court and find they were proper. By appellant's own admission, the homicide was committed during a robbery and for pecuniary gain. These two factors were properly merged into one by the trial court. The defendant was under sentence for another crime at the time the murder was committed; Johnson was on parole at the time. The defendant had previously been convicted of felonies involving the use or threat of violence. Appellant argues that the trial court erred in instructing the jury that the felonies of which Johnson had been convicted, attempted robbery and attempted murder, were as a matter of law felonies involving the use or threat of violence. Appellant further contends that the trial court's reliance on this factor was erroneous in the absence of evidence of actual violence used or threatened by appellant. Both robbery and murder involve violence *per se*; any attempt to commit these crimes must inherently involve the threat of violence. We find no merit here.

Having reviewed the record, we find no support for appellant's other points on appeal and see nothing to be gained by discussing them.

Accordingly, we affirm the conviction of murder in the first degree and the sentence of death.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, OVERTON, McDONALD and EHRLICH, JJ., concur.

SHAW, J., dissents with an opinion.

SHAW, Justice, dissenting.

I would remand for a new trial because the inadequacy of the reconstructed record precludes effective appellate advocacy and careful review. I do not see how a meaningful, independent review of this proceeding can be accomplished when the transcript contains omissions and inaccuracies. I recognize that a complete trial transcript is not required in every instance where there is an alternative adequate substitute. *Draper v. Washington*, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963). I do not think we have an adequate substitute here.

In the context of providing indigent defendants with trial transcripts at state expense, the United States Supreme Court has identified two factors to be considered in determining need: "(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript." *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S.Ct. 431, 433, 30 L.Ed.2d 400 (1971) (footnote omitted). Our duty in cases where there has been a judgment of conviction for a capital felony and sentence of death is to review the entire record. § 921.141(4), Fla.Stat. (1979); *Ferguson v. State*, 417 So.2d 629 (Fla.1982). If we find that the interests of justice require a new trial, we must reverse. Fla.R.App.P. 9.140(f). In the event fundamental error has occurred at any stage of the trial, it is our obligation to discover the error and reverse the conviction or the sentence, as the case might be.

This obligation exists regardless of whether defense counsel has discovered such an error. The scope of our review necessitates access to a transcript which reflects more than the general gist of the proceedings, one which is more than "substantially accurate." The record contains omissions; the entire voir dire and numerous changes and additions were inserted some year and a half after the proceedings, when memories admittedly were dim. Reversible error can turn on a phrase. Did it occur here? We cannot be certain.

Moreover, appellate counsel did not participate in the trial and is in the same predicament as we are regarding the transcript. In *Hardy v. United States*, 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed.2d 331 (1964), involving a federal criminal prosecution, the Court stated

> when ... new counsel represents the indigent on appeal, how can he faithfully discharge the obligation which the court has placed on him unless he can read the entire transcript? His duty may possibly not be discharged if he is allowed less than that. For Rule 52(b) of the Federal Rules of Criminal Procedure provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The right to notice "plain errors or defects" is illusory if no transcript is available at least to one whose lawyer on appeal enters the case after the trial is ended.

Id. at 279-80, 84 S.Ct. at 426 (footnote omitted). In his concurrence, Mr. Justice Goldberg stated

> appointed counsel must be provided with the tools of an advocate. As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy.

Id. at 288, 84 S.Ct. at 431 (footnote omitted). When there is missing from a record a "substantial and significant portion" in a criminal appeal involving new appellate counsel, reversal is required even in the absence of a specific showing of prejudice. *United States v. Selva*, 559 F.2d 1303 (5th Cir.1977). The present condition of the transcript in this appeal, in my opinion, renders it the functional equivalent of a transcript with substantial and significant missing portions.

In my view an unequivocally accurate record of the proceedings below is required to enable counsel and this Court to ensure that justice is done.

I would reverse.

In re FLORIDA RULES OF JUDICIAL ADMINISTRATION (DETERMINATION OF NEED FOR ADDITIONAL JUDGES).

No. 64344.

Supreme Court of Florida.

Nov. 22, 1983.

Original Proceeding—Florida Rules of Judicial Administration.

PER CURIAM.

Pursuant to article V, section 9 of the Florida Constitution, we hereby adopt Florida Rule of Judicial Administration 2.035 which sets forth the procedure for determining the need for additional judges, except supreme court justices, the necessity for decreasing the number of judges and for increasing, decreasing, or redefining appellate districts and judicial circuits, and also sets forth criteria and additional work load factors. This rule identifies criteria, factors, and the process previously devel-

Supreme Court of Florida

FRIDAY, JANUARY 13, 1984

TERRELL M. JOHNSON,	*	
Appellant,	*	CASE NO. 59,811
v.	*	Circuit Court No. CR80-101 Division (Orange)
STATE OF FLORIDA,	*	
Appellee.	*	

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7th CIR. APP. DIV.

Upon consideration of the Petition for Rehearing filed in the above cause by attorney for appellant, and response thereto,

IT IS ORDERED that said Petition be and the same is hereby denied.

ALDERMAN, C.J., BOYD, OVERTON, McDONALD and EHRLICH, JJ., concur
SHAW, J., dissents

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Tonya Carroll
Deputy Clerk

TC
cc: Hon. W. D. Gorman, Clerk
Hon. Rom W. Powell, Judge

Ronald K. Zimmet, Esquire
Mark C. Menser, Esquire

APPENDIX ITEM #2

the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237a, ch. 19564, 1939; CGL 1940 Supp. 8007(340); s. 1, ch. 70-339; s. 1, ch. 72-72; s. 8, ch. 72-724; s. 1, ch. 74-379; s. 948, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353.

Note.—Former s. 919.23.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—s. 2, ch. 78-274.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the Governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 2006, ch. 19564, 1939; CGL 8628, 8629; CGL 1940 Supp. 8007(370); s. 122, ch. 79-339.

921.16 When sentences to be concurrent and when consecutive.—

(1) A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall

CHAPTER 921

SENTENCE

921.09 Fees of physicians who determine sanity at time of sentence.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.

921.15 Stay of execution of sentence to fine; bond and proceedings.

921.16 When sentences to be concurrent and when consecutive.

921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.

921.18 Sentence for indeterminate period for noncapital felony.

921.185 Sentence; restitution a mitigation in certain crimes.

921.20 Classification summary; Parole and Probation Commission.

921.21 Progress reports to Parole and Probation Commission.

921.22 Determination of exact period of imprisonment by Parole and Probation Commission.

921.231 Presentence investigation reports.

921.241 Felony judgments; fingerprints required in record.

921.242 Subsequent offenses under chapter 796; method of proof applicable.

921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 266, ch. 19564, 1939; CGL 1940 Supp. 8885(266); s. 131, ch. 79-329.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 266, ch. 19564, 1939; CGL 1940 Supp. 8885(267); s. 132, ch. 79-329.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon

from any source, public or private, federal, state, or local, to supplement its operation and defray the expenses incurred in the operation and implementation of this act.

History.—s. 1, ch. 77-222; s. 2, ch. 78-323.

27.37 Council for the Prosecution of Organized Crime.—

(1) There is created in the office of the Governor a council to be known as the Council for the Prosecution of Organized Crime. The council shall be composed of five state attorneys appointed by and serving at the pleasure of the Governor. The Governor shall designate one member to serve as chairman.

(2) Members of the council shall be entitled to reimbursement for per diem and travel expenses as provided in s. 112.061.

(3) The Governor shall designate one member of the council who shall act as legal advisor and direct the operation of the statewide grand jury as provided in s. 905.36. The remaining members of the council may assist the legal advisor and attend sessions of the statewide grand jury.

(4) The council shall provide adequate staff support to the legal advisor designated by the Governor to direct the operation of the statewide grand jury.

(5) The council shall report to the Legislature on or before March 1, 1978, on the advances made in carrying out the objectives of this act.

(6)(a) All documents pertaining to criminal intelligence or investigations in the possession or control of the Council for the Prosecution of Organized Crime shall be exempt from the provisions of s. 119.07.

(b) The Council for the Prosecution of Organized Crime shall not be considered an "agency" within the definition of s. 120.52.

(c) If the council meets primarily to further any criminal investigation, that meeting shall be exempt from the requirements of s. 286.011.

(7) The chairman of the council or the legal advisor to the statewide grand jury may issue subpoenas and other necessary process to compel attendance of witnesses and take testimony before the council. The chairman or any member of the council may administer oaths or affirmations to witnesses who appear before the council to testify on any matter which the council may desire evidence.

(8) Any attorney employed by the council to provide staff support to the council shall be an assistant state attorney assistant to the legal advisor and the other members of the council consistent with the appointment, term, powers, duties, and compensation established in s. 27.181.

History.—s. 2, ch. 77-222; s. 3, ch. 78-323.

PART II

PUBLIC DEFENDERS

27.50 Public defender; qualifications; election.
27.51 Duties of public defender.
27.52 Determination of insolvency.
27.53 Appointment of assistants and other staff; method of payment.
27.5301 Salaries of public defenders and assistant public defenders.
27.54 Expenditures for public defender's office.
27.55 Compensation of public defender and expenditures for office in newly created circuit.
27.56 Assistance; lien for payment of attorney's fees or costs.
27.561 Effect of nonpayment.
27.562 Disposition of funds.
27.57 Reports.
27.58 Existing laws.
27.59 Access to prisoners.

27.50 Public defender; qualifications; election.—There shall be a public defender, who shall be a member of The Florida Bar in good standing, for each of the judicial circuits. The public defender shall be elected at the general election by the qualified electors of their respective judicial circuits as other state officials are elected and shall serve for a term of 4 years.

History.—s. 1, ch. 65-455; s. 10, ch. 73-333.

27.51 Duties of public defender.—

(1) The public defender shall represent, without additional compensation as provided in s. 925.035, any person who is determined to be insolvent, as provided in this act, who is under arrest for, or is charged with, a felony. The public defender may represent any person who is determined to be insolvent, as provided in this act, who is under arrest for, or is charged with, a misdemeanor or violation of a municipal or county ordinance in the county court. In any juvenile proceeding in a court in any county of this state having a population in excess of 380,000 according to the latest official decennial census, where a child is alleged to be a delinquent child pursuant to a petition filed therein and the said child is determined to be insolvent, and if such child requests or the court on its own motion appoints, the public defender or assistant public defenders shall represent said child. In any juvenile proceeding in a court in any remaining county of this state where a child is alleged to be a delinquent child pursuant to a petition filed therein and the said child is determined to be insolvent, and if such child requests, and the court on its own motion appoints, the Department of Health and Rehabilitative Services shall appoint counsel to represent said child from the legal staff available to the department. If legal counsel is not available from the department, the court may appoint the public defender, assistant public defender, or private counsel to represent the alleged delinquent indigent child. Nothing herein contained shall prevent the trial court from appointing private counsel in capital cases as provided in s. 925.035. The clerk of the court conducting such proceedings is directed to make such proceedings a matter of record.

(2) The public defender may, with the consent of the trial court, but without compensation by the state, accept the voluntary services of members of The Florida Bar in good standing in the defense of an insolvent person.

(3) All public defenders elected to office on or after November 1, 1972, shall be elected on a full-time basis and shall be prohibited from the private practice of law while holding office. Assistant public

defenders shall give priority and preference to their duties under the provisions of this act and may engage in private practice of law only to the extent that it will not interfere with or prevent performance of their duties as assistant public defenders and shall not otherwise engage in the practice of criminal law.

(4) The public defenders for the judicial circuits enumerated below may, if requested by any public defender within the appellate district shown, handle all appeals to the state and federal courts required of the official making such request:

(a) Public defender of the second judicial circuit, on behalf of any public defender within the district comprising the First District Court of Appeal.

(b) Public defender of the twelfth judicial circuit, on behalf of any public defender within the district comprising the Second District Court of Appeal.

(c) Public defender of the eleventh judicial circuit, on behalf of any public defender within the district comprising the Third District Court of Appeal.

(d) Public defender of the fifteenth judicial circuit, on behalf of any public defender within the district comprising the Fourth District Court of Appeal.

A sum shall be appropriated annually to the public defender of those judicial circuits enumerated in paragraphs (a)-(d) for the employment of attorneys as part-time public defenders, clerical employees, and expenses, including those incurred in cases on appeal.

History.—s. 2, ch. 59-220; s. 1, ch. 67-320; ss. 10, 23, ch. 69-106; s. 1, ch. 71-22; s. 1, ch. 73-227; s. 1, ch. 73-332; s. 1, ch. 73-334; s. 4, ch. 73-334; s. 2, ch. 77-147.

27.52 Determination of insolvency.—

(1) The determination of insolvency of any accused person shall be made by the court and may be done at any stage of the proceedings. Any accused person claiming insolvency shall file with the court an affidavit, the form for which shall be promulgated by the Department of Legal Affairs, and such affidavit shall supply and be consistent with the information required in subsection (2). The public defender shall be allowed process of the court to summon witnesses to testify before the court concerning the financial ability of any accused person to employ counsel for his own defense.

(2)(a) In proceedings for the determination of insolvency, there shall be a presumption of solvency, and the defendant shall have the burden of rebutting the presumption by competent proof.

(b) The following facts shall be prima facie evidence of solvency:

1. The defendant has been released on bail in the amount of $1500 or more.

2. The defendant has no dependents and his gross income exceeds $75 per week; the income limit shall be increased by $10 per week for each of the first two dependents of the defendant and by $5 per week for each dependent beyond the first two.

3. The defendant owns cash in excess of $300.

(c) The court shall also consider the following additional circumstances in determining insolvency:

1. The probable expense and burden of defending the case;

2. The ownership of, or equity in, any intangible or tangible personal property or real property or the expectancy of an interest in any such property by the defendant; and

3. The amount of debts owed by defendant or debts that might be incurred by the defendant because of illness or other misfortunes within his family.

(d) When the public defender, or a special assistant public defender appointed pursuant to s. 27.53(2), is appointed to represent a minor in any proceeding in circuit court or in a criminal proceeding in any other court, the parents of the minor child shall be liable for the costs of such representation in an amount not to exceed $750. Liability for the costs of such representation may be imposed in the form of a lien against the parents, which lien shall be enforceable by contempt proceedings. The court shall determine the amount of the obligation, and in determining the amount of the obligation the court shall follow the procedure outlined by this section.

(3) If the trial court shall determine and adjudge, within 1 year after the determination of insolvency, that any accused was erroneously or improperly determined to be insolvent the state attorney may, in the name of the state, proceed against such accused for the reasonable value of the services rendered to the accused and including all costs paid by the state or county in his behalf. Any amount recovered shall be deposited in the General Revenue Fund to the account from which the expenses of the office of public defender are paid.

History.—s. 2, ch. 59-220; s. 1, ch. 73-57; s. 4, ch. 73-334; s. 1, ch. 77-102; s. 2, ch. 77-102; s. 1, ch. 77-174; s. 2, ch. 77-102.

27.53 Appointment of assistants and other staff; method of payment.—

(1) The public defender of each judicial circuit is hereby authorized to employ and establish, in such numbers as he shall determine, assistant public defenders, investigators, and clerical personnel who shall be paid from funds appropriated for that purpose, up to the maximum salary provided by law.

(2) In addition, any member of the bar in good standing may be appointed by the court to, or may register his or her availability to the public defender of each judicial circuit for acceptance of, special assignments without salary to represent insolvent defendants. Such persons shall be listed and referred to as special assistant public defenders and be paid a fee and costs and expenses. Such fee and costs and expenses shall be fixed by the trial judge and shall be paid in the same manner and amount as counsel fees are paid in capital cases or as otherwise provided by law. In addition, defense counsel may be assigned and paid pursuant to any existing or future local act or general act of local application.

(3) If at any time during the representation of two or more indigents the public defender shall determine that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his staff without conflict of interest, or that none can be counseled by the public defender or his staff because of conflict of interest, it shall be his duty to move the court to appoint one or more members of The Florida Bar who are in no way affiliated with the public defender in his capacity as such, or in his private practice, to represent those

IN THE SUPREME COURT OF FLORIDA

TERRELL M. JOHNSON,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NO. 59,811

MOTION TO REMAND FOR NEW EVIDENTIARY HEARING AND TO SUPPLEMENT RECORD WITH AFFIDAVIT

Appellant requests that the Court remand this cause to the trial court for a new evidentiary hearing to determine whether the transcript of the trial is accurate and whether it can be accurately reconstructed, and further that the record be supplemented with the attached affidavit.

This Court has previously granted a motion to remand for the same purpose. The reporter was ordered to reconsider her transcript, and to make revisions as needed. The trial court concluded that, "Everyone involved admitted that the transcript when originally submitted to the supreme court contained a number of errors. The court reporter explained that the transcript had been sent to the supreme court by mistake before the court reporter had proofread it." (R1930) The trial court then ordered that the transcript be transmitted to the Supreme Court exactly as revised by the court reporter.

On remand the trial court refused to allow Appellant's counsel to examine the court reporter's original stenographic notes or to present testimony from an expert independent court reporter about the notes. The trial court did, however, grant a motion to preserve the notes. However, after the entire proceedings on remand were concluded, the trial court ordered that the record be supplemented with the notes, and indicated that since the notes were in the record counsel had the option to examine them. The trial court continued to refuse to hear any testimony about the notes, and indicated that he would not entertain a motion for rehearing.

With the assistance of a volunteer, expert court reporter, counsel has examined portions of the notes. That examination reveals that the trial court's reliance on the conclusion that the problems in the original transcripts were caused by lack of proofreading was misplaced. The errors in the original transcript admitted by 'everyone involved' were for the most part caused by the reporter's pattern of taking down only parts of any sentence spoken. There apparently were some proofreading errors, but the second version suffers from as many proofreading errors. In fact many if not most of the revisions in the second version were apparently invented by the reporter to make the sentences in the original transcript make sense. The stenographic notes contained many words written in pencil with such frequency as to indicate that they could not have been written in at the same time the notes were taken.

The following are comparisons of portions of the revised transcript and the expert reporter's transcription of the stenographic notes as contained in the attached affidavit. The upper lines are photo copies of the revised transcripts, and the typed lines below are the expert's transcription. The following few comparisons are for example. All of the comparisons possible from the volunteer reporter's work are in the appendix to this motion.

(Page 44, Lines 15-20)

Q Did you find any evidence of stippling on the gu
wound to the head of Mr. Dodson?

Q. Did you find any evidence of stippling on the gunshot wound to the head of Mr. Dodson

A Gunshot wound to the head, which was a three-ei
inch since it was a close gunshot wound, it had one-sixt
of an inch black in margin and purple red tattooing or s
if you will, for up to one-half inch around it.

A. Gunshot wound to the head which was a three eighty inch FIRE: BLA (or SISHS BLA) close gunshot wound it had one fifteenths of an inch black in margin and purple red, tattooing or stippling if you will for up to one half inch around it.

(Page 45, Lines 23-25)

23 Q What is that opinion?

Q. What is that opinion

24 A He died from ~~a strangulation~~ exsanguination or blood loss due to
25 multiple gunshot wounds of the chest and head.

A. he died from (EXA STRANGS ATION) or blood loss due tt multiple gunshot wounds of the chest and head

(Page 110, Lines 10-12)

Because, ~~if~~ as I understand it the ~~medical exam~~ dicedent

11 ~~went~~ messed up with the magnum, somehow, against the wall
12 and fired. Is it relevant, really prove anything?

Because as I understand medical examiner, messed up with the magnum, somehow against the wall and fired, is it relevant, really prove anything?

(Page 145, Lines 21-22)

21 THE COURT: If the Court doesn't find a Richardson
22 violation, ~~then there's no problem.~~ But, it's my

THE COURT: If the court doesn't find Richardson violation, ranges subsequent (or consequent) on our side,

The inescapable conclusion from the above comparison is that the reporter's second version of the transcripts is far from an accurate transcription of the stenographic notes, and cannot, therefore, be depended on as approaching a reliable record of the trial proceedings. Had the trial judge allowed the presentation

of such evidence it is more than probable that he would not have concluded that the second version was accurate because it represented a proofread version of the first transcript which "everyone involved" admitted contained errors. The trial judge should be allowed the opportunity for full review of the second version in light of testimony from the expert court reporter and a full examination of the stenographic notes.

The probable harm to Appellant of a failure to consider the state of the stenographic notes may be demonstrated by the following example.

The medical examiner was alternatively reported to say that one of the deceaseds died from "strangulation or blood loss" (first version); "exsanguination or blood loss" (second version); or "EXA STRANGS ATION or blood loss" (stenographic notes). The notes indicate than that the medical examiner may have just as likely have said "extravasation" as "exsanguination." The difference between the two is significant. Exsanguination is "forcible explusion of the blood from a part" while "extravasation" is "a discharge or escape, as of blood, from a vessel into the tissues." Exsanguination, therefore, indicates a higher level of violence than does extravasation. Death resulting from "extravasation" thus tends to coroborate the arguments in Appellant's initial brief that (1) the court erred in its findings that the homicide was "cold and calculated" and for the purpose of avoiding arrest, and (2) that Appellant was harmed when the court admitted a ballistics experiment to prove premeditation.

Appellant requests, therefore, that this case be remanded for a new evidentiary hearing, and that the record be supplemented with the attached affidavit from the expert court reporter.

This motion is submitted together with Appellant's initial brief and a motion for new trial because a full consideration of the issues raised in the motions also requires consideration of the harm done to Appellant on appeal by an unreliable transcript. That harm is apparent when considering the specific

issues Appellant raises. It is, therefore, requested that this Court consider this motion together with the motion for new trial and the issues raised in the Appellant's initial brief.

Respectfully submitted,

RONALD K. ZIMMET
CHIEF ASSISTANT PUBLIC DEFENDER
1012 South Ridgewood Avenue
Daytona Beach, Florida
32014-6183
Phone: (904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, and a copy to Terrell M. Johnson, Inmate No. 010796, Florida State Prison, P. O. Box 747, Starke, Florida 32091, this 20th day of DECEMBER, 1982.

RONALD K. ZIMMET
CHIEF ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

TERRELL M. JOHNSON, Appellant,	)	
vs.	)	CASE NO. 59,81[illegible]
STATE OF FLORIDA, Appellee.	)	

A P P E N D I X

Comparison of photocopies of official reporter's revised version of transcripts with transcription of stenographic notes by volunteer reporter.

(Page 44, Lines 3-20)

THE COURT: I think he answered that and maybe answered a question that might be anticipated. Objection will be overruled.

THE COURT: I think he answered that and maybe answered a question might be anticipated objection be overruled.

BY MR. SMALL:

Q Doctor, could you tell us what is stippling?

MR. SMALL:

Q. Doctor, could you tell us, what is stippling?

A Stippling is produced when a gun is fired, it's produced because portions of gun powder which are not completely burned come out of the muzzle and strike the skin.

A. Stippling is produced when a gun is fired, it is produced because portions of gunpowder which are not completely burned come out of the muzzle and strike the skin.

Because these pieces of unburned powder are usually either vertically shaped, they have their own velocity and when they hit the ski they cause little abrasions or stipplings.

Because these pieces of unburned powder are spherical or shape they have own velocity and when hit the skin cause little abrasions or stipplings

further, obviously, yo get away from the muzzle, the wider array of stipplings get this comes ou like a funnel. If you get far away, the stippling disappears, usually, six, seven inches, depending on the gun.

Further obviously you get away from the muzzle, wider array, of stipplings gets comes outline funnel. if you get far away stippling disappears, usually six, seven inches it is go (or gone) depending on the gun.

Q Did you find any evidence of stippling on the guns wound to the head of Mr. Dodson?

Q. Did you find any evidence of stippling on the gunshot wound to the head of Mr. Dodson

A Gunshot wound to the head, which was a three-eigh inch, since it was a close gunshot wound, it had one-sixtee of an inch, black in margin and purple red tattooing or stippling if you will, for up to one-half inch around it.

A. Gunshot wound to the head which was a three eights inch SIRBS BLA (or SISHS BLA) close gunshot wound it had one six-teenths of an inch black in margin and purple red, tattooing or stippling if you will for up to one half inch around it.

(Page 45, Lines 23-25)

Q What is that opinion?

Q. What is that opinion

A He died from exsanguination ~~strangulation~~ or blood loss due to multiple gunshot wounds of the chest and head.

A. He died from (EXA STRANGS ATION) or blood loss due to multiple gunshot wounds of the chest and head

(Page 109,. Lines 24-25, page 110, lines 1-12, 13-22)

THE COURT: Excuse me. Mr. Hinshelwood, come up ju a minute?

THE COURT: Excuse me, Mr. Hinshelwood, come up just a minute.
(P. 100)

(Whereupon, counsel approached the bench and conferred out of the hearing of the Jury.)

(Counsel approached the bench out of the presence of the jury)).

MR. HINSHELWOOD: The answer is, that in fact there is a pattern of a pistol.

AT THE BENCH:

Mr. Hinshelwood: The answer is that in fact there is a pattern. pistol.

THE COURT: but where are you going with that?

THE COURT: But where going with that?

MR. HINSHELWOOD: Based on --

Mr. Hinshelwood: Based on --

THE COURT: Put it up against the wall and fire with it?

THE COURT: , up against the wall and fire with it.

MR. HINSHELWOOD: Yes.

Mr. Hinshelwood: Yes.

THE COURT: Is there something else that ties into it make it relevant.

THE COURT: Something else that ties into makes it relevant.

Because, as I understand it the defendant ~~testified~~ pressed up with the magnum, somehow, against the wall and fired. Is it relevant, will it really prove anything?

because as I understand medical examiner, messed up with the magnum, somehow against the wall and fired, is it relevant, really prove anything?

MR. HINSHELWOOD: Well, it shows the circumstances of the shooting.

Mr. Hinshelwood: Well it shows, of the circumstances of the shooting.

Just one example, that it wasn't a struggle.

Just one example it wasn't a struggle.

THE COURT: I don't know whether I would draw that conclusion.

THE COURT: I don't know whether I'd draw that conclusion.

Ask him one more question or two more; what blows out of the pistol, where, and get on with it.

ask him one more question, or two more, what blows out of the pistol where and get on with it

(Whereupon, the following was had in the presence of the Court and Jury.)

(Back in hearing)

BY MR. HINSHELWOOD: Q Mr. Park, material come out of any part of the hand-gun?

Mr. Hinshelwood: Mr. Park material come out of any part of the hand gun?

(Page 165, Lines 21-25)

THE COURT: If the Court doesn't find a Richardson violation,

THE COURT: If the court doesn't find Richardson violation, ranges subsequent (or consequent) on our side,

But, it's my finding that last Wednesday Mr. Hinshelwood learned of Mr. Conwell's existence by talking to the trooper by telephone correct?

but it is my, finding that last Wednesday, Mr. Hinshelwood learned of Mr. Conwell's, existence by talking to the trooper by telephone correct

(Page 167, Lines 1-22)

A Well, there were three sets of swabs.

A. Well, there were 3 sets of swabs,

One swab was labeled an upper spot, allegedly a swab from a wall of a bathroom.

one swab was labeled an upper spot allegedly swab from a wall of a bathroom.

Another swab labeled lower spot, same wall of the bathroom. And another set of swabs were blank or just a swab identity agent which was used in the swabbing procedure, was wetted in the cotton swab to assure no contamination in the collection, and analysis of the swabs revealed the presence of both barium antimony, and the cotton swabs labeled upper and lower swab in concentration was consistent with gunshot residue

another
swab labeled lower spot same wall of the bathroom and another set swab was blank or just swab as identify agent which was used in the swabbing procedure was wetted in the cotton swab to assure no contamination in the collection analysis of the swabs revealed presence of both barium and AN MON 1 and cotton swabs labeled upper and lower swab in concentration consistent with gunshot residue

Q Mr. Scala, what is gunshot residue?

Q Mr. Scala what is gunshot residue?

A What we refer to in this particular instance is actually primer residue, barium antimony is coming from the primer portion of the cartridges.

A. What we refer to in this particular instance is actually primer residue, barium and AN MON 1 is coming from the primer portion of the cartridges.

That is, primer is a small charge sitting at the base of the shell which is ~~designated~~ detonated by the firing pin of the weapon.

That is primer is a small charge sitting at the base of the shell which is detonated by the firing pin of the weapon.

Once this small charge is ~~designated~~ detonated it ignites the powder which is the propellant for the projectile.

Once this small charge detonated it ignites the powder which is the propellant for the projectile.

Now, when this primer is ~~designated~~ detonated it mixes with the ~~designated~~ detonated powder and ~~spew~~ spewed out around the weapon and ~~drops this~~ deposited on any surface very near the discharged weapon. For instance, hands or any other surface which would be very near to the discharging of the weapon.

IN THE SUPREME COURT OF FLORIDA

TERRELL M. JOHNSON, Appellant,	)	
vs.	)	CASE NO. 59,811
STATE OF FLORIDA, Appellee.	)	

AFFIDAVIT

Emily Mann, after having been first duly sworn, stated as follows:

1. Expert Court Reporter Qualifications:

She has been a court reporter (freelance, official in criminal court, and official in circuit court) for 38 years. She is an active member of the Florida Shorthand Reporters Association and of the National Shorthand Reporters Association. She is a Fellow in the Academy of Professional Reporters. She has conducted seminars for the National and Florida Shorthand Reporters Associations and for several other state associations and the Jamaica Shorthand Writers Association. She has authored materials published in the National Shorthand Reporter and in Florida Shorthand Notes. She is the author of two books: "Legal Procedures for Court Reporters" published by the National Shorthand Reporters Association and "Verbatim Punctuation" published by the Florida Shorthand Reporters Association. She has taught court reporting both private instruction and at Polk Community College. The Florida Shorthand Reporter's Association has honored her by naming an annual award "The Emily Mann Distinguished Service Award."

2. Examination of Reporter's Stenographic Notes:

(a) On November 5, 1982, she examined portions of the reporter's stenographic notes taken in State v. Johnson, Circuit Court Case No. CR80-101.

After being advised that the reporter used the Berry Horne system of reporting and after reviewing the Berry Horne system, Mrs. Mann believes the following to be a verbatim transcription of the stenographic notes. The corresponding page and line numbers from the record on appeal are noted of the portions transcribed by Mrs. Mann.

(Page 44, Lines 1-20)

THE COURT: I think he answered that and maybe answered a question might be anticipated objection be overruled.

BY MR. SMALL:
Q. Doctor, could you tell us, what is stippling?

A. Stippling is produced when a gun is fired, it is produced because portions of gunpowder which are not completely burned come out of the muzzle and strike the skin. Because these pieces of unburned powder are spherical or shape they have own velocity and when hit the skin cause little abrasions or stipplings Further obviously you get away from the muzzle, wider array, of stipplings gets comes outline funnel, if you get far away stippling disappears, usually six, seven inches it is gone depending on the gun

Q. Did you find any evidence of stippling on the gunshot wound to the head of Mr. Dodson

A. Gunshot wound to the head which was a three eighths inch SIRBS BLA (or SISHS BLA) close gunshot wound it had one sixteenths of an inch black in margin and purple red, tattooing or stippling if you will for up to one half inch around it.

(Page 45, Lines 23-25)

Q. What is that opinion

A. He died from (EXA STRANGS ATION) or blood loss due to multiple gunshot wounds of the chest and head

(Page 109, Lines 24-25, page 110, lines 1-22)

THE COURT: Excuse me, Mr. Hinshelwood, come up just a minute. (p. 110) (Counsel approached the bench out of the [presence of the jury]).

AT THE BENCH:

MR. HINSHELWOOD: The answer is that in fact there is a pattern, pistol.

THE COURT: But where going with that?

MR. HINSHELWOOD: Based on--

THE COURT: , up against the wall and fire with it.

MR. HINSHELWOOD: Yes.

THE COURT: Something else that ties into makes it relevant. Because as I understand medical examiner, messed up with the magnum, somehow against the wall and fired, is it relevant, really prove anything?

MR. HINSHELWOOD: Well it shows, of the circumstances of the shooting. Just one example it wasn't a struggle.

THE COURT: I don't know whether I'd draw that conclusion ask him one more question, or two more, what blows out of the pistol where and get on with it

(Back in hearing)

MR. HINSHELWOOD: Mr. Park material come out of any part of the hand gun?

(Page 145, Lines 21-25)

THE COURT: If the court doesn't find Richardson violation, ranges subsequent (or consequent) on our side, but it is my, finding that last Wednesday, Mr. Hinshelwood learned of Mr. Conwell's, existence by talking to the trooper by telephone correct

(Page 167, Lines 1-22)

A. Well, there were 3 sets of swabs, one swab was labeled an upper spot allegedly swab from a wall of a bathroom. Another swab labeled lower spot same wall of the bathroom and another set swab was blank or just swab as identify agent which was used in the swabbing procedure was wetted in the cotton swab to assure no contamination in the collection analysis oi the swabs revealed presence of both barium and AN MON I and cotton swabs labeled upper and lower swab in concentration consistent with gunshot residue

Q. Mr. Scala what is gunshot residue?

A. What we refer to in this particular instance is actually primer residue, barium and AN MON I is coming from the primer portion of the cartridges. That is primer is a small charge sitting at the base of the shell which is detonated by the firing pin of the weapon. Once this small charge detonated it ignites the powder which is the propellant for the projectile. Now when this primer is detonated it mixes with the detonated powder and spewed out around the weapon and deposited on any surface very near discharge weapon.

(b) The reporter's stenographic notes also contain words which have been written in pencil (not included in Mrs. Mann's transcription). These words occur with such frequency

as to indicate that they could not have been written contemporaneously with the taking of the shorthand notes during the trial.

(c) Mrs. Mann has compared the stenographic notes (of the above transcribed portions) with the second version of the transcript submitted by the court reporter, and is of the opinion that the reporter did not take down verbatim what was said at trial, and that the reporter's performance is significantly below that expected of a competent reporter.

EMILY MANN

Sworn to and subscribed to
before me this ____ day
of _____, 198__.

Notary Public, State of Florida at Large
My Commission Expires April 2, 1988

THE COURT: We will take a short recess. When everybody gets back, we will keep going.

(Whereupon, the trial recessed at 4:40 to resume shortly.)

(Whereupon, the trial resumed at 4:45 p.m. o'clock.)

THE COURT: Now, gentlemen, here is what I propose to do after we complete the examination with Ms. Horne. I think, what I am going to do is bring in the back row and excuse them until 10:00 o'clock. It is taking us six, seven minutes per juror and it will take us an hour to complete this middle row. That will put us about 5:30, a quarter to 6:00. I don't want to work much past that.

Anybody ~~else~~ problems with that?

MR. JONES: No.

MR. SMALL: No, sir.

(Whereupon, the Juror, Ms. Horne, entered the courtroom.)

THE COURT: Ma'am, you are Ms. Horne?

MS. HORNE: Yes.

THE COURT: Ma'am, have you heard, read, listened to any news accounts about this case?

MS. HORNE: Not that I know of.

THE COURT: Have you heard anybody talking about the case?

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ORLANDO FLORIDA 32801

MS. HORNE: (Nodded in the negative.)

THE COURT: All you know about it is what you heard today?

MS. HORNE: Right.

THE COURT: Do you hold any religious beliefs against the death penalty?

MS. HORNE: I am not in favor of it.

THE COURT: What do you mean by that?

MS. HORNE: I guess I do hold religious beliefs.

THE COURT: What is your religion?

MS. HORNE: I am a Baptist.

THE COURT: Let me ask you this question. Because of the beliefs which you say you hold about the death penalty, would you automatically vote against it no matter what the facts and circumstances are?

MS. HORNE: I am kind of mixed. I can see it could be a deterrent and then again, I am not in favor it. I would not automatically --

THE COURT: You wouldn't automatically vote against it?

MS. HORNE: (Nodded in the negative.)

THE COURT: All right. Now, let me ask you this question. Because of your personal feelings that you say you have about the death penalty, would that prevent you from making a fair and impartial decision as to the issue of guilt?

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MS. HORNE: No.

THE COURT: Okay. In other words, while the jury is deliberating on their verdict, you could put out of your mind any personal feelings you had about the death penalty and reach a verdict as to guilt or innocence?

MS. HORNE: Right. (Nodded in the affirmative.)

THE COURT: You could do that even though the jury, if it returned first degree verdicts, might go into a penalty phase and the majority might recommend death and this Court might impose death, still put that out of your mind?

MS. HORNE: Right.

THE COURT: Tell us in a couple of sentences a little bit more how you feel about the death penalty?

MS. HORNE: Well, like I said, I am kind of mixed. I have religious beliefs on one side, on the other hand, I do see how it could be used as a deterrent. So --

THE COURT: Is your mind open at this point?

MS. HORNE: Pretty much, right.

THE COURT: Do you have any personal reservations about the ability to get back there and deliberate in the jury room and vote one way or the other?

MS. HORNE: No.

THE COURT: You wouldn't be a nervous Nellie and say, I can't vote?

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MS. HORNE: No.

THE COURT: All right.

Mr. Small?

MR. SMALL: Ms. Horne, you understand there is going to be, in effect, two separate deliberations. One where you determine whether or not Mr. Johnson is guilty of first degree murder. Do you understand that only if he is found guilty of first degree murder will you go into the second phase, do you understand that?

MS. HORNE: Yes.

MR. SMALL: So what Judge Powell is asking you, I want to satisfy myself and make sure you understand the questions. You get back there and according to the law he has read to you, you are sure he is guilty of first degree murder.

But in your mind, you vote yes. If I vote first degree murder he can be sentenced to death, it's pretty close to second degree murder, would you hold out to second degree?

MS. HORNE: No, because I won't be doing the sentencing.

MR. SMALL: Now, for the purposes of this question I need to assume a few things. Let's assume, first of all, you are a juror. Second of all, you have sat there through this whole trial and you have gone through the delibera-

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tions and you have found Mr. Johnson guilty of one or both counts of first degree murder.

Let's assume you have come back into the courtroom and that you have heard a number of mitigating factors on one side and the aggravating factors on the other side, and you have heard Judge Powell's instructions with regard to the factors.

Now, you go back in the jury room and in your mind you are convinced according to the law the death penalty is appropriate.

MS. HORNE: (Nodded in the affirmative.)

MR. SMALL: Could you, irrespective~~by~~ of how anyone else felt about it, could you yourself recommend the death penalty?

MS. HORNE: I don't think I could.

MR. SMALL: Even if you were convinced according to Judge Powell's instructions it was appropriate, you feel you could not recommend the death penalty?

MS. HORNE: I don't think I could.

THE COURT: Ma'am, really, I guess what you are saying is that you would...you could not ever vote the death pena[illegible], recommend the death penalty no matter what the case turned out to be, is that right?

MS. HORNE: Well, I thought you said before you would do the actual sentencing.

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THE COURT: That is true.

MS. HORNE: We would try to determine guilty or not guilty.

THE COURT: If the majority of the jury recommends either death or I guess, what Mr. Small asked you and what I am asking you is, would you just, even though the jury reached a first degree verdict, would you automatically recommend life?

MS. HORNE: Yes, probably.

THE COURT: You would?

MS. HORNE: (Nodded in the affirmative.)

THE COURT: Okay.

Mr. Jones?

MR. JONES: Ms. Horne, you understand the Judge doesn't have to follow your...yours is simply a recommendation. The Judge doesn't have to follow it.

MS. HORNE: Right.

MR. JONES: But you would feel you would always recommend life no matter what the facts and circumstances are, no matter what the law is, you would always recommend life and under no circumstances could you recommend death?

MS. HORNE: It's really hard to say without the circumstances, but --

MR. JONES: Well, if you could imagine the worse

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possible murder, could you recommend death in that situation?

MS. HORNE: Probably not.

MR. JONES: That is all I have, Your Honor.

THE COURT: Okay, gentlemen?

(Whereupon, counsel approached the bench and conferred off the Record.)

(Whereupon, the following was had on the Record.)

THE COURT: Ma'am, if you could step outside the room one moment with the lady bailiff.

(Whereupon, the Juror retired from the courtroom.)

MR. JONES: Your Honor, the State has announced they wish to excuse Ms. Horne 'o cause. We would object to the Court granting that Motion or granting an excused for cause and state as the basis, Witherspoon and related cases that the defendant is entitled to a fair representative, cross section of the community to sit on his jury. This segment of society, that is, the segment that does not believe in the death penalty and cannot impose the death sentence is in fact a viable section of our society and he should be entitled to either have, number one, of the segment on the jury or require the State to exercise a peremptory challenge.

THE COURT: I understand the law under Witherspoon, and the cases following Witherspoon. If the Juror would

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automatically vote against the death penalty, no matter what the circumstances, that Juror may be challenged for cause by the State.

The Court finds that is in fact that Juror's testimony. She said, the last question, even the most horrible murder possible, she couldn't impose the death penalty.

That is what I understood the thrust of her position was so the Court will grant that challenge for cause.

If you will have the young lady step inside.

(Whereupon, the Juror, Ms. Horne, entered the courtroom.)

THE COURT: Ma'am, the Court is going to excuse you from service on this case. Thank you. You may return home and come back to the central panel jury room at five minutes to 9:00 tomorrow.

Do us a favor, do not discuss it with the other panel members what you learned today. We may be drawing others to complete our jury.

Thank you, Ma'am.

MS. HORNE: Thank you.

THE COURT: Let's bring the back row in.

(Whereupon, the back row of jurors entered the courtroom.)

Pam Wheeler

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ORLANDO, FLORIDA 32801

about the case. In a case of this type, the Court has the discretion to sequester, lock up the jury. I don't want to do that in this case, and therefore, I am relying on each individual juror to follow these instructions of the Court explicitly.

MS. YAVORSKE: Yes.

THE COURT: Thank you, ma'am. See you in the morning. Thank you for your patience.

MS. YAVORSKE: Your welcome.

THE COURT: Ms. Bowman.

MR. HINSHELWOOD: Excuse me, Your Honor, may we have a moment to confer?

THE COURT: Yes, sir.

(Whereupon, the Juror, Ms. Cutrera, entered the courtroom.)

THE COURT: Ms. Cutrera, we are calling you out of turn. Would you mind letting...would you get Ms. Bowman, we will get back to you.

MS. CUTRERA: No, not at all.

(Whereupon, the Juror, Ms. Cutrera, retired from the courtroom and the Juror, Ms. Bowman, entered the courtroom.)

THE COURT: You are Ms. Bowman?

MS. BOWMAN: Yes, sir.

THE COURT: I am going to ask you a short sequence of questions about your attitrde on the death penalty. Do

not draw any inference of guilt, this is just simply crossing a bridge before we get to it, if we do.

You indicated your husband was a priest?

MS. BOWMAN: Mm-hmm.

THE COURT: Do you have any religious beliefs against the death penalty?

MS. BOWMAN: I have to admit that I am a little bit.. not quite sure.

THE COURT: Not sure about that?

MS. BOWMAN: My husband does not believe in it at all.

THE COURT: How about you personally?

MS. BOWMAN: I personally, let me say, I feel uncomfortable, if I thought anything that I said...wait a minute, if I thought my belief in a person's guilt would bring about that, that might bother me. That would bother me.

THE COURT: Would that prevent you, assuming you went through both phases of the case, heard all the evidence, listened to the comments of counsel, heard the Court's instructions on how to sort it out in the penalty phase, and you felt in your heart, mind and conscience the death penalty was warranted in this case; could you vote to return an advisory sentence of death, could you do that?

MS. BOWMAN: I don't think that is what I'm saying.

If it came to that, I don't think I could do that. I think I would want to...well --

THE COURT: You think then, you would automatically vote against the death penalty no matter what the facts and circumstances of this case are?

MS. BOWMAN: I think I probably would.

THE COURT: All right.

Mr. Hinshelwood?

MR. HINSHELWOOD: No questions, at this time.

MR. JONES: I appreciate the fact you do have personal feelings, we all have personal feelings. But, the criteria that we use here in the courtroom is whether or not you would be able, under your oath as a juror, to follow the law the Court will give you? If you would be able to take these personal feelings, set them aside, and follow the law that the Court gives you.

Do you think you would be able to do that or do you think your personal feelings would be so involved in trying to follow the law you wouldn't be able to do it, that you couldn't abide with your oath as a juror?

MS. BOWMAN: I need to ask you a question.

MR. JONES: Sure.

MS. BOWMAN: I think I could form an opinion as to whether a person was guilty or not guilty.

MR. JONES: Right. Okay. Even though you know if

you found him guilty of first degree murder you might have to later decide the question of what sentence to advise, would you still be able to find him guilty of first degree murder?

MS. BOWMAN: Well, I would not be...I mean, I think that the Judge already said it would be up to the Judge to pass sentence.

MR. JONES: Final sentence?

MS. BOWMAN: So, a juror --

MR. JONES: (Interposing) Yours is an advisory sentence, the voice of the community, so to speak. After hearing all the aggravating and mitigating circumstances, the foreman will come up and say a majority of this jury recommends ~~either death~~ either death or life with no parole for twenty-five years. Now, would you be able, assuming now he has been found guilty of first degree murder, would you be able to remove your personal feelings from your consideration of what advisory sentence you would return?

Would you be able to remove your personal feelings and follow the law the Judge will give you as to what matters you are to consider?

MS. BOWMAN: I think that is a hard question. I don't think I quite understand what you are saying.

MR. JONES: What I'm trying to say, everyone has personal feelings. Do you feel your personal feelings would interfere with your following the law?

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ORLANDO, FLORIDA 32801

MS. BOWMAN: In other words, I see. Okay. I don't think I would want to be responsible for a person's death.

MR. JONES: No one wants that, but we are asking you if you would be able to remove your personal feelings and follow the law even to the extent, if the law, according to what the Judge would give you, would require you return an advisory sentence of death?

MS. BOWMAN: I honestly don't think I can answer that.

MR. JONES: Well, no one else can answer it for you, so --?

MS. BOWMAN: Well, I am trying to say, I don't think I could do that.

MR. JONES: I don't have anything else, Judge.

THE COURT: All right.

(Whereupon, counsel approached the bench and conferred off the Record.)

(Whereupon, the following was had on the Record.)

THE COURT: Ma'am, we are going to excuse you. Thank you for your patience throughout this day.

Please return tomorrow at five minutes to 9:00 to the central panel jury room. Thank you.

MR. JONES: Your Honor, the same objection as before.

THE COURT: You have it in the Record.

Rose Wheeler

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ORANGE COUNTY COURTHOUSE
ORLANDO, FLORIDA 32801

MAR 7 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 83-6390

TERRELL M. JOHNSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TERRELL M. JOHNSON, petitioner in the above-styled cause hereby moves this Court, by his undersigned counsel, for leave to proceed in forma pauperis and in support hereof shows as follows:

1. An affidavit signed by petitioner is attached hereto, wherein petitioner sets forth the fact that he is indigent and unable to pay or give security for the fees and costs attendant to this proceeding.

2. Petitioner was adjudged insolvent for the purpose of appeal in the Supreme Court of Florida and was represented there by appointed counsel.

WHEREFORE, it is respectfully requested that petitioner be permitted to proceed in forma pauperis in this matter.

Respectfully submitted,
JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

RONALD K. TURNER
CHIEF ASSISTANT PUBLIC DEFENDER
1012 South Ridgewood Avenue
Daytona Beach, Florida
32014-6183
Phone: (904) 252-3367

ATTORNEY FOR PETITIONER

MAR 7 1984
Office of the CLERK
SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General, Department of Legal Affairs, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014 and to Mr. Terrell M. Johnson, Inmate No. 010796, Florida State Prison, Post Office Box 747, Starke, Florida 32091 this 5th day of March, 1984.

RONALD F. ZIMMER
CHIEF ASSISTANT PUBLIC DEFENDER

ATTORNEY FOR PETITIONER

RECEIVED
MAR 7 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 83-6390

IN THE

SUPREME COURT OF THE UNITED STATES

TERRELL M. JOHNSON

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, TERRELL M. JOHNSON, being first duly sworn, depose and say that I am the Petitioner, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on certiorari are the following:

I. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND FULL REVIEW BY THE FLORIDA SUPREME COURT BECAUSE THE TRANSCRIPT OF THE TRIAL PROCEEDINGS IS UNRELIABLE AND INCOMPLETE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

II. PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE TWO POTENTIAL JURORS WERE IMPROPERLY EXCUSED FOR CAUSE BECAUSE OF THEIR EQUIVOCAL BELIEFS ON CAPITAL PUNISHMENT.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

_____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1975, $8.70 hr.
Union Carpenter. Cal Koven Const Co.
Miami Beach, Fla.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings account? No

a. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

a. If the answer is yes, describe the proeprty and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Lemuel M. Johnson
LEMUEL M. JOHNSON

SUBSCRIBED AND SWORN TO before me
this 14 day of February, 1984.

Notary Public, State of Florida

My commission expires: